Understanding the Determinants of ICC Involvement: Legal Mandate, Power Politics, and the Crisis of Legitimacy

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Abstract

What explains the initiation and escalation of International Criminal Court (ICC) involvement in a situation? In light of recent charges of bias against and challenges to the institutional legitimacy of the ICC, understanding the determinants of ICC involvement is critically important. Does the ICC get involved in those situations most in need of international attention and prosecution – i.e. those with the gravest violations of human rights and the least likelihood of domestic prosecution of the perpetrators? Or, alternatively, are the Court's decisions influenced by international politics? This paper analyzes the determinants of ICC involvement and the escalation of that involvement. We test a legal mandate argument – that ICC involvement and escalation are driven primarily by the severity of human rights violations and the lack of domestic ability or will to prosecute such violations – against a power politics argument – that economic and security relations with leading states, such as the five permanent members of the United Nations Security Council (P5) impact where the ICC will initiate investigations and how far those investigations progress. Using a variety of measures for both arguments in a country-month analysis from 2002-2015, we find that the ICC's motivations are mixed. Both the gravity of human rights violations and links to the P5 influence the ICC's decision-making.

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INTRO REVISIONS: Crisis of legitimacy at the ICC – Africa bias, AU backing mass withdrawal; phillinpines pulling out this year, etc. Challenges based on case selection primarily. Other challenges claiming the court is ineffective – fails to bring ppl to justice, fails to fulfill its mandate (not sure if we should introduce this here or not).

The Rome Statute establishing the International Criminal Court (ICC) entered into force on July 1, 2002. Today, 124 states have ratified the Rome Statute, making them States Parties to the ICC. The ICC is the first permanent, international body charged with prosecuting genocide, crimes against humanity, and war crimes when domestic justice systems are either unwilling or unable to do so. Unlike previous international tribunals tasked with investigating and prosecuting individuals for war crimes, such as the International Tribunals for the Former Yugoslavia and Rwanda, the ICC's Office of the Prosecutor (OTP) has considerable discretion when it comes to determining which cases it will pursue; the OTP's proprio motu authority allows it to initiate investigations independent of state or UNSC referral, and even in referred cases, the court retains ultimate decision-making authority with regard to whether or not to pursue formal investigations, warrants, and trials (Danner 2003; Schabas 2011; Stahn 2009). Thus, the ICC is a novel institution, enjoying more influence and discretion in the pursuit of justice and promotion of international criminal and humanitarian law than any analogous institutions before it.

Furthermore, the ICC has become an active player in international justice. It has, to date, initiated 24 preliminary examinations, ten of which have advanced to formal investigations, and has initiated proceeding against 39 individuals as of early 2017. However, these ongoing examinations and cases represent only a small fraction of the total number which have been referred to the Court; as of September 2016, the Court had received 12,022 communications from individuals, NGOs, and IOs, pursuant to article 15 of the Rome Statute, providing information on alleged crimes falling under the Court's

jurisdiction from countries all over the world.[1]

The Court's vast discretion in selecting cases, coupled with the large number of situations that have been referred through formal communications, begs a critical question: how does the OTP decide which situations to examine or investigate? Understanding the Court's selection process should be of critical importance to both scholars and policymakers, particularly in light of recent and growing criticism of the Court for its alleged case-selection biases. In particular, all of the situations in which the ICC has proceeded to the formal investigation stage involve African countries, except for one (i.e. Georgia). This so-called Africa bias has prompted criticism from prominent regional leaders such as Rwanda's Paul Kagame and key institutions, especially the African Union, and threatens to erode the Court's influence and legitimacy in the region (BBC News 2012; Murithi 2012). In fact, in 2016 Burundi, South Africa, and Gambia threatened and/or initiated proceedings to leave the ICC, based upon claims of an Africa bias (Murphy 2016).

This paper systematically examines how the ICC selects its cases, and which cases it decides to escalate. Does the Court, consistent with its mandate, pursue justice in the gravest situations characterized by the worst violations of international humanitarian law, or is its decision-making influenced more by institutional constraints and resulting strategic calculations? We develop two alternative theoretical explanations for the Court's behavior, termed the legal/institutional incentives argument and the realist/institutional constraints argument. Each focuses on a different aspect of the incentives and constraints faced by the OTP to explain the court's behavior. The first builds upon the notion that the Court's central goal is to fulfill its organizational mandate and to increase its institutional legitimacy in the service of that goal. The second argues that institutional constraints, such as the court's lack of enforcement capabilities, generate incentives for

[1]Office of the Prosecutor, "Report on Preliminary Examination Activities 2016."

the OTP to avoid cases that jeopardize or conflict with the interests of the most powerful states in the international system. The institutional incentives argument leads us to hypothesize that ICC involvement is more likely in countries facing the gravest violations of human rights, and in states that lack the willingness or ability to hold individuals accountable domestically. The institutional constraints hypothesis, on the other hand, suggests that ICC involvement becomes less likely as powerful states' interests in a given country increase.

We focus on the ICC's decision to both start preliminary examinations and to escalate to formal investigations, warrants, hearings, and trials, as both initiation and escalation constitute key decision points for the ICC. We thus measure ICC involvement on a scale, hypothesizing that grave human rights abuses will increase the likelihood of higher levels of ICC involvement (legal argument), while increasing ties with strong states will decrease the likelihood and level of ICC involvement. Our expectations are also directional, such that human rights abuses perpetrated by the government are expected to increase the likelihood of state-focused ICC involvement and escalation, whereas abuses perpetrated by non-state actors are anticipated to increase the risk of opposition-focused ICC involvement, as well as the escalation of such involvement. We also anticipate that P5 ties to governments will decrease state-focused ICC involvement/escalation, while P5 ties to opposition actors will decrease the likelihood of opposition-focused ICC action.

We test these hypotheses using an original country-month dataset identifying ICC involvement from 2002 through 2015. The empirical analyses reveal several important findings. First, while our models of ICC onset generally perform poorly, we do find that ICC involvement onset is more likely when the government and rebels intentionally target a greater number of civilians. Our models of the escalation of ICC involvement generally produce stronger results, and provide support for both the legal mandate and the institutional constraints framework. ICC escalation is more likely when more human

rights abuses have occurred and when domestic courts are weak, but is also more likely when P5 states do not have strong ties to the targeted actor. Finally, African states are not systematically more likely to experience a preliminary examination, but they are more likely to be formally investigated by the Court, suggesting the Africa bias is more complex than previously thought.

This paper contributes to a burgeoning literature on the ICC, empirically addressing one of the key debates in contemporary scholarship and a central question among policy makers and political leaders. Specifically, does the Court act in accordance with its mandate? Proponents of the Court view it as a transformational institution with unprecedented authority to investigate and prosecute individuals that infringe upon state sovereignty. If the Court does not fulfill its mandate by selecting the most egregious crimes against international criminal and humanitarian law, however, it cannot live up to this lofty goal. Second, this paper puts forward two competing theoretical arguments – one institutionalist and one realist – to explain ICC behavior. It thus contributes to the vibrant scholarly debate on the role and functioning of international institutions and organizations in world politics. Finally, our results provide empirical evidence relevant to the debate over the Court's role in Africa. They indicate that while the court is largely unbiased in its selection of preliminary examinations, it has, thus far, favored African countries when moving to the formal investigation stage and beyond.

This paper proceeds as follows. We first review existing research on the ICC from both political scientists and legal scholars. The brief discussion suggests that there is a major gap in the literature on the determinants of ICC involvement. The next section develops the paper's two central theoretical arguments on the institutional incentives and institutional constraints of ICC involvement. The following section presents the research design, discusses the data and measurement issues, and presents the results of our empirical analysis. We conclude by examining the implications of these findings and

providing directions for future research.

Literature Review

The ICC has garnered significant attention from legal scholars, political scientists, and policy-makers since its inception in 2002. Because of its institutional novelty and important role in international politics, scholars have examined a wide variety of questions centered on the Court, beginning with how the Rome Statute developed (Deitelhoff 2009; Fehl 2004; Goodliffe and Hawkins 2009) and why it has been ratified by so many states, given that accepting the Court's jurisdiction infringes upon state sovereignty (Chapman and Chaudoin 2012; Meernik and Shairick 2011; Simmons and Danner 2010).

Recent research also examines the ICC's effectiveness in terms of promoting international peace, or what is termed the peace versus justice debate. Theoretically, some scholars argue that international prosecution facilitates peace by deterring future perpetrators of atrocities (Akhavan 2001; Gilligan 2006; Goldstone 1995), while others argue that the Court's deterrent capabilities are limited (Goldsmith and Krasner 2003; Goldsmith 2003; Ku and Nzelibe 2006; Wippman 1999) or even that Court action is counterproductive (Goldsmith 2003; Souare 2009). Empirical investigations are similarly mixed; while some show that ratification of the Rome Statute is associated with steps towards peace (Simmons and Danner 2010) and improved human rights practices (Appel 2013), others find that involvement by the ICC can impede conflict resolution (Prorok forthcoming) and peaceful transfers of power (Ku and Nzelibe 2006; Nalepa and Powell 2015).

To date, however, little research has focused on how the Court chooses its cases. An important exceptions is the work by Bosco and Rudolph (2013), which examines the process by which the Court moves from a preliminary examination to a formal investigation. Bosco and Rudolph find support for a strategic interests argument – the Court appears to avoid moving to the formal investigation stage when strong states including the US,

China, and Russia have economic or security interests in that country. Aside from this singular example, however, the question of where and when the ICC chooses to get involved has gone largely unanswered. This is a particularly troubling gap in existing literature, given that the Court has come under increasing scrutiny in recent years, particularly from the African Union and a number of African governments, for its alleged bias towards investigating weak, poor states in the global South while overlooking violations by strong, Western nations (Murithi 2012).

More generally speaking, understanding the Court's decision-making process is important, independent of the Africa debate, as it touches on the fundamental role of the ICC in world politics. Proponents of the Court argue that it is a transformational institution with unprecedented authority to investigate and prosecute individuals that infringe on state sovereignty. The Court can only attain this status if it acts in accordance with its mandate to prosecute those suspected of committing grave international crimes. If the ICC acts primarily in the service of powerful states' interests, on the other hand, its institutional legitimacy may ultimately suffer and it will fail to achieve the status that the court's proponents hoped for when the Rome Statute was first conceived.

Existing literature provides few insights into whether the Court acts with its mandate in mind, or whether it follows some other decision rule. We are thus unable to answer the most basic question about the functioning of the Court: how does the ICC choose where it will act? Is its decision-making process driven primarily by its legal mandate or more by the OTP's strategic considerations? It is to these questions that we turn in the following sections, theoretically and empirically examining the process by which countries come under the scrutiny of the ICC.

Theoretical Framework

Existing research suggests that international organizations have some degree of autonomy from the states that created them. IOs derive authority and independence through the delegation processes that state engage in when creating them, and through the expertise and specialization that they provide (Barnett and Finnemore 2004, 43).

The ICC, specifically, is imbued with rational-legal authority as a result of the Rome Statue ratification process which brought it into being.

Given that the ICC's situation-selection and advancement process is largely autonomous from the states that created it, it is imperative to understand the incentives and constraints of decision-makers at the court in order to build a coherent theory of ICC behavior.

In creating the ICC, states delegated to the Court the authority and autonomy to select situations for examination and investigation (Danner 2003; Schabas 2011; Stahn 2009). While decision-making at the ICC is legally autonomous from member states and other international actors, that does not mean the court is indifferent to or unaffected by states. Rather, we assume that the ICC and in particular the OTP strategically selects situations to examine and potentially formally investigate.[2] This is because the Court, despite its independence, must still be perceived as legitimate by members of the international community to maintain its institutional viability, or even survival.[3]

[2]Arguably, there are greater restrictions, or greater state input on the first of these decisions. We discuss this further... FIX THIS FOOTNOTE, this is a really important footnote to justify why we think the ICC has discretion over the first, but also to acknowledge they have more control over the second.

[3]This assumption is in line with sociological-institutionalist approaches, which argue that "organizational survival and acceptance are dependent on demonstrating legitimacy" (Barnett and Finnemore 2004, 43) (ADD SUCHMAN 1995 CITATION TOO).

Specifically, legitimacy is critical for the ICC for at least two reasons; first, the OTP and ICC require the cooperation of governments and other actors to properly investigate potential perpetrators. For example (Arrests, access, etc). Second, states that view the ICC as illegitimate may withdraw from it. Indeed, we observe this very problem occurring today, as several African states and even the African Union (AU) have either threatened to withdraw from the Court or even left it over its perceived bias against African states. As a result of these consequences, we argue that the court selects situations that it expects will maintain or increase its legitimacy in the eyes of the international community, broadly speaking, and member states more specifically.

Importantly, the Court can derive legitimacy through multiple different pathways.[4] In the sections below, we develop two different strategic logics of ICC decision-making. The first suggests that the ICC selects situations for examination and investigation most in line with its institutional mandate (i.e. to try the gravest cases that domestic courts cannot or will not take on). As we argue below, acting in line with the court's legal mandate is important to the ICC's legitimacy because "states have little incentive to maintain support for an IO that routinely acts contrary to the mission that member states have assigned to it" (Beardsley and Schmidt 2012, 39). The second argument below suggests that ICC decision-making is affected by the need to maintain the support of strong states whose support allows the court to function effectively. This selection strategy has implications for the court's legitimacy because IOs are often "judged by what they accomplish, and ... lack of effectiveness injures their legitimacy" (Barnett and Finnemore 2004, 168).

Importantly, these two selection strategies are neither mutually exclusive, nor always

[4]For example, research suggests that IOs benefit from procedural legitimacy, or whether their "procedures are viewed as proper and correct", as well as substantive legitimacy, or whether they are "reasonably successful at pursuing goals that are consistent with the values of the broader community" (Barnett and Finnemore 2004, 166).

fully compatible with one another. The ICC, therefore, faces a tradeoff; pursuing cases in line with powerful states' interests may improve legitimacy by making it more likely that the court gains the backing of key international actors to support its investigations and prosecutions, but doing so may also undermine legitimacy by deepening the belief that the court is a pawn of powerful states. On the other hand, selecting situations purely based upon issues of gravity and complementarity may improve legitimacy by demonstrating the court's strict adherence to the mandate given to it by member states, but may undermine the court's ability to effectively carry out its examinations and investigations if the gravest cases are threatening to powerful states' interests and thus are not supported by key international actors.

Case Selection based on Legal Mandate

As noted above, one central way international organizations maintain legitimacy is by acting in accordance with their institutional mandates (Barnett and Finnemore 2004; Beardsley and Schmidt 2012; Finnemore 2009).[5] Continual discrepancies between the goals and norms established in the Rome Statute and the actual behavior of ICC prosecutors would undermine the Court's legitimacy, and therefore the support it receives from state parties and the international community more generally. Therefore, the court has incentives to select situations for examination and investigation that demonstrate its dedication to the mandate established in the Rome Statue.

We identify two key aspects of the ICC's institutional mandate that should drive the court's decision-making. First, the Rome Statute tasks the ICC with investigating and prosecuting individuals who have committed the "most serious crimes of concern to the

[5]This is, furthermore, consistent with a neoliberal or rational-functionalist accounting of IO behavior, which stresses that "states have little incentive to maintain support for an IO that routinely acts contrary to the mission that member states have assigned to it" (Beardsley and Schmidt 2012, 39).

international community as a whole" (Rome Statue 5(1)). That is, the court is expected to focus its attentions on the world's gravest crimes. In fact, this criterion is written into the Rome Statute's sections on admissibility: Article 17(1)(d) of the Statute allows the Court to declare a case inadmissible "when it is not of sufficient gravity to justify further action by the Court" (Schabas 2011, 200). Therefore, the ICC's central mandate is to pursue justice for the world's worst abuses of human rights.[6]

The second aspect of the legal mandate that is central to case selection decisions centers on one of the Court's central admissibility principles. The ICC was conceived of and operates as a 'court of last resort', meaning its jurisdiction extends only to situations in which domestic legal systems are unwilling or unable to effectively investigate or prosecute suspected violators of the law. That is, "The Court is intended to complement, not to replace, national systems. It can only prosecute if national systems do not carry out proceedings or when they claim to do so but in reality are unwilling or unable to carry out such proceedings genuinely" (Bensouda 2012). This is referred to as the complementarity principle, and is addressed in Article 17 of the Rome Statute, as well as paragraph 10 of the Preamble (Schabas 2011). Evidence suggests that the OTP adheres to this complementarity principle when determining whether it has jurisdiction over particular situations: in all situations brought before the Court, the OTP has assessed the pres-

[6]Focusing on the gravest abuses of human rights, furthermore, should help the court achieve one of its secondary goals – the deterrence of future human rights abuses. Deterrence was a central concern of the crafters of the ICC, and an issue that the Court has taken up directly by noting that targeting the highest level perpetrators of the gravest human rights abuses is the best way to maximize the court's deterrent effects (Schabas 2011, 201, quoting from Lubanga arrest warrant decision). This relates closely to the idea of legitimacy: the ICC must build and maintain legitimacy in order to deter human rights violations, and it can only do so, or can do so most effectively, if it prosecutes the world's worst abusers of human rights.

ence and legitimacy of national proceedings before moving forward with ICC proceedings (Bensouda 2012).[7]

These two principles suggest that the OTP will initiate preliminary examinations and escalate its involvement to a formal investigation in situations characterized by the gravest human rights violations, and when domestic courts are unwilling or unable to hold perpetrators accountable. We expect the gravity, or severity, of the abuses perpetrated by a government or non-state actors to be a strong, positive predictor of ICC initiation of a preliminary examination and escalation to a formal investigation. The court's involvement will be directed, furthermore, at the actor specifically responsible for human rights abuses. That is, the OTP will initiate examinations and advance formal investigations against agents and supporters of the state when the government has perpetrated grave abuses of human rights, and will initiate and escalate investigations against non-state actors (i.e. rebels and members of the opposition) when such non-state actors are responsible for grave human rights violations.

Our second mandate-based expectation, based upon the complementarity principle, is that the court evaluates the likelihood of effective domestic prosecution before acting itself, pursuing investigations and prosecutions only in situations where domestic institutions fail to act in an unbiased, impartial manner. The likelihood of unbiased domestic prosecution, we argue, is a function of the effectiveness or independence of the state's judicial system (Conrad and Ritter 2013; Conrad 2014; Conrad and Moore 2010; Powell and Staton 2009). States with independent judicial institutions can more easily investigate and try perpetrators of gross human rights violations, even if those perpetrators are

[7]Currently, eight situations – those focused on Afghanistan, Colombia, Guinea, Iraq, Nigeria, Burundi, Israel, and Ukraine – are in this admissibility phase, where the Court examines and monitors domestic proceedings in order to determine whether further ICC action is warranted.

high-ranking government officials. In states without judicial independence, on the other hand, perpetrators can commit violations with domestic impunity. The state's judicial system can be manipulated such that government officials and citizens more generally can avoid prosecution should they commit acts proscribed by the ICC.

However, assessing the presence and quality of domestic prosecutions is often undertaken as part of an ICC preliminary examination, in what the OTP labels Phase 3, or assessing admissibility. We therefore expect that an independent judiciary will primarily impact OTP decisions on whether or not to advance from the preliminary examination to the formal investigation stage. That is, complementarity is primarily a factor affecting the escalation of ICC involvement. Our expectation, therefore, is that higher levels of judicial independence will be associated with fewer formal investigations, regardless of the target (government or opposition).

Case Selection based on Power Politics

Strict adherence to the mandate established in the Rome Statute is not the only factor affecting the ICC's legitimacy. Research on institutional legitimacy suggests that an IO's perceived legitimacy is also affected by what it accomplishes, or its effectiveness (Barnett and Finnemore 2004; Suchman 1995, 580). An institution that continually fails to accomplish its designated objectives will be perceived by member states as ineffective and will, as a result, suffer legitimacy costs that might ultimately threaten its viability. (POSSIBLY ADD SENTENCE REFERENCING CURRENT CHALLENGES TO THE COURT ON EFFEFFECTIVENESS GROUNDS).

An important determinant of IO effectiveness is whether it receives financial and political support from states, especially powerful ones (Barnett and Finnemore 2004, 168). This is true for the ICC, as the court's institutional capacity, as established in the Rome Statute, is limited in several ways. First, the ICC lacks enforcement capabilities. It has

no standing army or police force and cannot execute its own warrants, and therefore relies upon the cooperation of states for enforcement (Goldsmith and Krasner 2003; Prorok 2017). The inability to enforce warrants/summonses on its own is a crucial limitation for at least two reasons. First, governments may lack the willingness or capability to capture and transfer wanted individuals themselves.[8] Uganda, for instance, has been unable to capture wanted LRA leader Joseph Kony, and Ugandan president Museveni has requested the assistance of the United States to track him down. A government may also lack the willingness to turn over suspects, even if it has the capacity to do so. For example, the Ivory Coast government has refused to turn over Simone Gbago, wife of former President Laruent Gbago, to the ICC. Given that involved governments may often be unable or unwilling to enforce ICC warrants, pressure from third party states can play a crucial role in achieving compliance, either by aiding the unable or coercing the unwilling. The Court therefore relies upon support from third party states, especially powerful ones, in order to successfully prosecute wanted individuals.[9]

Further, it relies upon the cooperation and support of states to carry out its investigations. In the preliminary examination stage, the Court spends a considerable amount of time in a state to determine if it should move to a formal investigation. Once a formal investigation is underway, the Court must collect the necessary evidence to prosecute potential perpetrators. In the Democratic Republic of Congo, for instance, the OTP conducted more than 70 missions inside and outside of the DRC, while in Uganda it completed nearly 50 missions in a 10 month period (Human Rights Watch 2008). During its visits to Uganda, the OTP relied on the Ugandan Armed Forces as escorts to travel throughout the country due the instability there (Human Rights Watch 2008). Third party support

[8]While some indicted individuals voluntarily turn themselves in, many suspects remain at large and must be arrested by states and transferred to the Court to face trial.

[9]http://www.bbc.com/news/world-africa-24179992

may be necessary in many cases to persuade reluctant governments to cooperate with ICC investigators, or to financially support these fact-finding missions. Lacking state support, therefore, the Court could not operate effectively.

How do these constraints affect the ICC's decision-making process? They are potentially quite important, as they may alter the Court's incentives. Ultimately, strong enough constraints may affect which situations the Court decides to examine or investigate. That is, these constraints may undermine the Court's ability or willingness to efficiently fulfill its organizational mandate by pursuing justice in the gravest cases. The logic is as follows. As established above, the OTP is, in many cases, dependent upon powerful states for enforcement. In addition, the Court has an incentive to maximize its appearance of effectiveness and/or power. That is, the Court has incentives to limit actions that it believes will be directly refused or ignored, as this could weaken the institution, harming its reputation as a powerful institution and undermining its legitimacy. Because of its dependence upon strong states and because its legitimacy and continued functioning depend upon its effectiveness as an institution, the OTP is unlikely to select cases for examination or investigation that threaten strong states' interests. Were the Court to lose the support of key powerful states upon which it relies for enforcement, the ICC's effectiveness at fulfilling its mandate would decrease, and its legitimacy would suffer. Thus, the Court has incentives to maintain the support of the system's strongest states, in particular the five permanent members of the UN Security Council (P5). P5 support, or at least acquiescence, is key to the Court, despite the fact that three of the P5 – the United States, Russia, and China – are not state parties to the Rome Statute.

First, P5 support is critical because these are the states with the power, resources, and international reach to act as the ICC's enforcers or, alternatively, to directly undermine the Court's effectiveness. The United States, for example, despite its refusal to ratify the Rome Statute, has turned over suspects to the Court. In April 2013, US officials

transferred fugitive warlord Bosco Ntaganda to the Hague after he turned himself in to a US Embassy in Rwanda (Simons 2013). Similarly, as noted above, the US has worked with Uganda to capture LRA leader Joseph Kony. Second, because the Rome Statute gives the P5 the authority to refer cases to the ICC, the P5 constitute an important audience for the Court. The P5 came together in 2011 to refer the situation in Libya to the Court, demonstrating implicit support for the institution and bolstering its legitimacy. Russia and China, on the other hand, vetoed a UNSC resolution in May 2014 that would have referred the situation in Syria to the Court ("Syria War Crimes Move Blocked at UN" 2014).

Finally, the P5 are states with the coercive capacity to indirectly support or undermine the court. That is, they have a variety of carrots and sticks at their disposal that they can use to persuade third party states and other non-state actors to either support or undermine the ICC. The American Rewards for Justice Program, for example, bolsters the Court indirectly. While US law prohibits direct payments to the Court, this program supports the Court's activities by providing payments of up to five million dollars to third parties for information that leads to the apprehension of fugitives in atrocities cases (Simons 2013). Likewise, several European states issued travel bans against indicted Kenyan leaders William Ruto and Uhuru Kenyatta, while President Obama refused to visit Kenya during his 2013 trip to Africa due to the ICC's indictments there.[10] P5 actions are not always benevolent, however; reports indicate that Western diplomats exerted significant pressure on the Court not to open a Gaza war crimes inquiry (Borger 2014; "Report: US Exerting Pressure on ICC Not to Open War Crimes Probe against Israel" 2014).

Ultimately, this suggests that P5 interests are likely to affect the Court's case selec-

[10] http://www.the-star.co.ke/news/article-99118/uhuru-ruto-banned-visiting-europe

tion decisions. Because the Court (1) relies upon strong states, particularly the P5, for enforcement support, (2) can have referrals blocked by the P5, and (3) receives significant indirect support and pressure from P5 states, the OTP is likely to take P5 interests into consideration as it determines which situations to pursue. The Court is, therefore, likely to pursue cases when it anticipates P5 support, whereas it may shy away from initiating preliminary examinations or escalating its involvement when P5 interests are mixed or are overtly threatened by such action. That is, the goal of pursuing justice in the worst situations where it cannot be served domestically may be undermined by the constraints the Court faces due to its reliance upon strong state support for enforcement, and its need to maintain support and effectiveness so as not to undermine its own legitimacy.

This logic suggests that the OTP will be less likely to initiate preliminary examinations and escalate its involvement in situations when such actions threaten P5 interests. This effect will be directed, furthermore: the OTP is less likely to initiate and escalate against agents and supporters of the state when the P5 have close ties to that state, and will be less likely to initiate and escalate investigations against non-state actors (i.e. rebels and members of the opposition) when P5 states have close ties to the relevant non-state actors.

It is important to note that choosing to pursue cases in line with its legal mandate or with powerful states' interests can, in theory, bolster the ICC's legitimacy, these two sources of legitimacy are, at times, contradictory. Pursuing one strategy, furthermore, can backfire, undermining the court's legitimacy rather than increasing it. The functional need to prove efficacy, for example, requires the court to tailor its behavior to the specific interests of the powerful, but doing so may backfire, compromising the impartiality and nondiscriminatory prinicples of the institution. As Barnett and Finnemore (2004, 169) note, IOs face a dilemma: "effective performance requires reliance on powerful member states, but that same reliance can undercut an IO's substantive and procedural legitimacy

when it undermines the appearance of impartiality and objectivity."

Research Design

The empirical analysis presented below uses the country month as the unit of analysis, covering state months from July 2002 (when the ICC became active) through December 2015. There are a total of 31,175 country months in our dataset.[11] While we would prefer to limit our sample to cases with some minimal expectation of ICC involvement, identifying that set of 'at-risk' cases is nontrivial. One possibility would be to establish as the relevant population of cases only those situations that have been referred to the Court by communications from states, international organizations, and non-governmental organizations. The Court, however, has not made details on communications received publicly available, and numerous attempts to obtain this information have gone unanswered. Another possibility would be to restrict the sample of potential cases to countries with high levels of one-sided violence, human rights violations, etc. However, these factors that likely influence the expectation of ICC involvement are included in our models as independent variables, precluding us from using them to select our cases. We therefore use all country-months as our sample for analysis. This allows us to investigate potential ICC involvement in all states since 2002 without relying on potential explanatory variables to select a relevant set of observations.[12]

[11]The actual number of observations in the empirical analysis is smaller due to missing data on some variables.

[12]As a robustness check, we do limit our sample when predicting the onset of ICC involvement to a restricted set of cases that (1) have experienced a political terror (PTS) score of 3 or higher or (2) have experienced civil conflict at some time since 2002. Restricting the sample in this way does not significantly change our empirical results.

Response Variables

The empirical analysis below tests the determinants of ICC involvement onset and escalation, while also accounting for the target of the ICC's involvement. Specifically, we examine four dependent variables: (1) State-Focused ICC Onset, (2) Opposition-Focused ICC Onset, (3) State-Focused ICC Escalation, and (4) Opposition-Focused ICC Escalation. To measure each of these variables, we first need to determine what constitutes involvement in a particular country by the ICC. To do this, we first identify whether the behavior of, or actions taken by, officials or nationals of a particular country is explicitly being examined or investigated by the ICC. Evidence of this includes explicit references to the behavior of or crimes potentially committed by nationals of that country in ICC reports and documentation. We examined a variety of documents from the ICC, including press releases on the opening of examinations/investigations, yearly reports on the Court's activities, summary reports for ongoing cases, etc. Importantly, this coding rule means that the state associated with a particular "situation" is not necessarily the state, or the only state, experiencing ICC involvement. For example, the situation referred to the ICC by Comoros, Greece, and Cambodia does not involve an investigation of actions taken by these states or their nationals, but instead is focused on potential abuses committed by Israel. We therefore treat Israel as the target of ICC involvement, while excluding Comoros, Greece, and Cambodia as ICC targets. Additionally, in the court's preliminary examination focused on Afghanistan, both Afghanistan and the United States are implicated. This is because reports provided by the ICC on it's preliminary examination activities explicitly refer to potential abuses perpetrated by Afghan forces and nationals, as well as to potential abuses committed by US forces in Afghanistan. Thus, ICC involvement is coded for both Afghanistan and the United States.

After identifying which states have experienced ICC involvement, we code two variables to capture the onset of ICC involvement. State-Focused ICC Onset is a dummy

variable coded 1 in the month the ICC begins a preliminary examination in which the government is targeted. We consider the ICC's actions to be government-targeting if they involve examining/investigating actions taken by current members of the state's security forces or current political leaders. We also consider actions to be state-targeting if the Court investigates alleged crimes committed by supporters of or groups supported by the current regime.[13] This variable is coded 0 in all other months, and importantly, observations with ongoing ICC involvement remain in the dataset, as it is possible for the ICC to begin a new examination even if the first one is still ongoing (e.g. Central African Republic). This variable is coded 1 in 19 of 31,175 observations (.06%). Opposition-Focused ICC Onset is a dummy variable coded 1 in the month the ICC begins a preliminary examination targeting opponents of the state in question. Opponents include current rebels, political opponents, and any others who are not considered state targets. This variable is coded 0 in all other months, and as with the state-based onset variable, is also coded 0 during ongoing investigation months. This variable is coded 1 in 15 of 31,175 observations (.05%).[14]

The third and fourth dependent variables, State- and Opposition-Focused ICC Escalation, measure the level of ICC involvement in a given month on a scale from 1 to 6. For these variables, we code the highest level of ICC involvement reached in any given month that is focused on a current member or supporter of the government (state-focused) or opposition (opposition-focused).

The levels of ICC involvement are as follows: a 1 is coded if the highest level of ICC

[13]For example, this includes crimes allegedly committed on behalf of Kenyan government officials by private citizens (i.e. lawyers engaging in witness tampering on their behalf). This would also include crimes allegedly committed by pro-government militia groups that receive state backing.

[14]In several cases, both state and opposition figures are implicated in the ICC's actions. In these cases, both onset variables are coded 1.

involvement in the current month is a preliminary examination. This includes referrals from states parties or the UN Security Council that have not yet progressed to a formal investigation. A 2 is coded for country months in which a formal investigation is ongoing, but which have not progressed to the issuing of warrants or beyond. A 3 is coded for country months in which the highest level of ICC activity is an outstanding warrant or summons (i.e. that warrant/summons has not been executed). A 4 is coded for country months in which the highest level of ICC activity involves a suspect being in custody at the Hague and/or hearings ongoing to determine whether or not to confirm charges against a suspect. A 5 is coded once charges have been confirmed against a suspect, but before a trial begins, and a 6 is coded if a trial is ongoing.[15]

It is also important to note that these variables are coded based upon the status of those being investigated in any given month. This means that the highest level of state or opposition-focused ICC involvement may change if those under investigation switch sides. This can occur, for example, if a regime change occurs in which targeted government officials lose power or targeted opposition members come to power.

Two brief examples will help elucidate the coding of these variables. First, the ICC initiated a preliminary examination into the situation in Colombia in 2004. The Court's examination explicitly focuses on actions taken both by rebel organizations opposed to the state (i.e. FARC and ELN) and pro-government paramilitaries and the state's own security forces. The ICC's examination, furthermore, has not proceeded to the formal investigation stage. Therefore, State-Focused ICC Escalation is coded 1 from June 2004 through December 2015, as there is an ongoing preliminary examination during this time that potentially implicates state officials. Rebel-Focused ICC Escalation is also coded 1 from June 2004 through December 2015, due to the ongoing preliminary examination that

[15]Ongoing trial involves everything from the opening of the trial through the sentencing phase.

implicates members of opposition groups.

Second, the ICC has been involved in the situation in Libya since February 2011, when it was referred to the OTP by the UNSC. By March, the ICC's involvement progressed to a formal investigation, and by June 2011, warrants were issued. Those warrants remain outstanding today. At the beginning of the ICC's involvement, the Court's efforts were focused on current state officials – Gaddafi and members of his inner circle – and therefore the ICC's involvement is coded as State-focused. This changed, however, in September 2011, when the Gaddafi regime fell and former regime opponents took power. As a result, our coding changes in September 2011, such that Opposition-Focused ICC Involvement is coded 3 from that month on.

Based upon the above coding rules, State-Focused ICC Escalation has the following distribution: 1) 843 observations 2) 49 observations 3) 116 observations 4) 16 observations 5) 34 observations and 6) 66 observations. Rebel-Focused ICC Escalation is distributed as follows: 1) 644 observations 2) 124 observations 3) 189 observations 4) 74 observations 5) 130 observations and 6) 130 observations. Observations are excluded from the escalation equations if they do not have some ongoing ICC involvement.

Legal Mandate Variables

The legal mandate argument suggests that the OTP will base its case selection on the gravity of abuses committed. To test this expectation, we include variables that account for violations of international humanitarian law. First, civilian targeting provides a useful metric for identifying human rights abuses committed by state and opposition officials because the extra judicial killing of noncombatants is expressly prohibited by international humanitarian law (Blank and Noone 2013).

We use the Uppsala Conflict Data Program's (UCDP) Georeferenced Event Dataset (GED) version 5.0 to identify the number of civilians killed by government and opposi-

tion groups in any given month (Melander and Sundberg 2013). The GED is an events dataset that includes information on all instances of civilian targeting, or One Sided Violence (OSV), perpetrated by governments and nongovernmental actors between 1989 and 2015. These data have several advantages over other measures of human rights violations. First, they are available through 2015, whereas many other existing datasets that capture human rights practices end earlier, which would force us to shorten our analysis timeframe and ignore important cases of ICC involvement. Second, these data allow us to identify the perpetrators of human rights violations. Other possible datasets such as PTS and CIRI provide only a single country-level 'score', which identifies the level of human rights violations in a given country. They do not allow us to identify violations perpetrated by non-state actors, as the scores generally refer to state-based abuses. This is critically important, given that ICC action is often directed at specific non-state or opposition actors within the state, not at the state itself. Measuring violations of human rights perpetrated only by the state, therefore, is insufficient as a predictor of directed ICC involvement. Finally, the OSV data provided by GED provides several advantages over other measures because it is events-level data. It can therefore be easily aggregated to the monthly level to generate a measure of the magnitude of OSV perpetrated by government or non-state actors in a given month. Other Human Rights datasets, which provide a yearly summary measure of human rights violations, provide less variation and are not as compatible with our monthly data on ICC involvement.

To measure government OSV, we first generate the sum of all civilians killed in one-sided violence events perpetrated by each government in a particular month based upon the raw events data from GED.[16] We then create two separate measures for the onset and

[16]The GED does not include data for Syria, but otherwise has global coverage. We therefore include data from UCDP's One-Sided Violence dataset (Eck and Hultman 2007) for Syria. These data are yearly rather than monthly, so we divide the number of deaths committed in a given year evenly across the

escalation analyses. First, to understand the impact of government-perpetrated OSV on the risk of state-focused ICC onset, we generate a running sum of the number of civilians killed in government-perpetrated OSV since July 2002, through the current month. This running sum provides a measure of the magnitude of human rights violations perpetrated by the state since the ICC became active. It is important to use this running sum rather than a simple measure of deaths in a given month because the Court can decide to investigate instances of war crimes or crimes against humanity that occurred any time since a state came under its jurisdiction or since the court became active (if referred by the UNSC or the state itself).[17] In our model predicting State-Focused ICC Onset, we therefore include the natural log of the running sum of state-perpetrated OSV since July 2002. This variable ranges from 0 to 8.7, with an average of 3.8.

In our model predicting State-Focused ICC Escalation, we measure the level of government-perpetrated OSV that occurred during the period under examination/investigation. For each preliminary examination and investigation, the ICC reports, often with great specificity, a particular date range that constitutes the focus of its inquiry. For example, The ICC's investigation of the situation in Georgia explicitly focuses on the events of July 1 through October 10, 2008. Some investigations are more open-ended; for exam-

months of that year. While this is an imperfect solution, it does allow us to include Syria, a potentially important case, in our analysis. It is also better than using some other data sources that have more micro-level civilian deaths data, as the definition of OSV is not the same across other data sources, whereas the two UCDP dataset use the same definition of civilian targeting. Finally, it is important to note that our results remain consistent if we exclude Syria from the analysis.

[17] An alternative would be to create a running sum of OSV perpetrated since the state became a ratifier of the Rome Statute. However, this would not allow us to include states that have not ratified the Rome Statute, and would ignore the fact that states can come under investigation by the ICC for crimes committed despite non-ratification if they are referred by the UNSC or a non-state party who accepts the Court's jurisdiction on an ad hoc basis.

ple, the investigation in Uganda focuses on events since July 1, 2002, inclusive of today. This variable, therefore, identifies the period under investigation and then sums the total government-perpetrated OSV committed during that period. If the period of investigation is ongoing (e.g. Uganda) in the current month, this variable equals the running sum since the start of the period under investigation, through the current month. This variable is logged to account for its skewed distribution. The variable ranges from 0 to 8.6 with an average of 3.6.

In our models predicting Opposition-Focused ICC Onset and Escalation, we create variables analogous to those created for the state. We start by identifying all OSV perpetrated by non-state actors on the territory of a given state in a given month. We then sum those deaths to create a monthly total number of civilians killed by non-state actors in a given state in a given month. In the onset equation, we include the natural log of the running sum of opposition-perpetrated OSV since July 2002. This variable ranges from 0 to 9.3 with an average of 4.9. In the escalation equation, we include the total non-state perpetrated OSV committed during the period under investigation, or, if the period of investigation is ongoing, from the start of the period of investigation through the current month. This variable ranges from 0 to 9.1 with an average of 4.4.

Finally, we include a measure of judicial independence from Powell and Staton (2009). This variable is a composite measure that incorporates information from seven different measures of judicial independence, and varies between 0 and 1, where higher values indicate greater independence of a state's judiciary. This corresponds well with the principle of complementarity, as it proxies the willingness and ability of the judiciary to investigate alleged perpetrators of war crimes and crimes against humanity. States with strong, independent judiciaries have the capacity to investigate perpetrators, while those with weak, non-independent judiciaries cannot credibly threaten an independent, effective investigation. This holds for investigations that target both the state and opposition: a

non-independent judiciary will be unable to hold state officials accountable because the judiciary is dependent upon those state officials. A weak judiciary, furthermore, will likely be unable to carry out an effective, unbiased investigation of opposition perpetrators. States with strong judiciaries, therefore, make both state-focused and opposition-focused ICC involvement unnecessary. As discussed above, this effect should be particularly pronounced in the analysis of ICC escalation, as preliminary examinations may take place in states with strong judiciaries, but those examinations are unlikely to progress. In the sample, judicial independence ranges from .02 to .99 with a mean of .54.

Realist/Institutional Constraints Variables

As argued above, it is likely that the Court considers the reactions of third party states, especially the P5, when it becomes involved in a situation. The implication is that the ICC might be more reluctant to target states that have strong ties with the P5. Based on this logic, we include several variables in our empirical analysis to account for a state's relationship with the P5.

First, we include measures of military closeness to the P5. We create two dummy variables to identify ongoing military intervention by a P5 state into a given country. We collected original data on P5 interventions, as existing datasets either were unavailable for the time period covered in our investigation, or restricted their coverage to large interventions or only those during events such as civil wars (Koch and Sullivan 2010; Pickering and Kisangani 2009). To collect this information, we had coders search Lexis Nexis for news articles about military actions taken by each of the P5 states between 2002 and 2015. Excluded from this measure are military deployments that were humanitarian in nature, peacekeeping, or interventions intended to simply remove nationals of a P5 state from a risky situation. The variables we use in the analysis identify whether there is an ongoing military intervention by any P5 state in a given country-month. We also iden-

tify whether that intervention is pro-government or pro-opposition, which generates two dummy variables. The first, Pro-State Intervention is coded one if there is an ongoing P5 military presence supporting the government in a given country-month. The second, Pro-Opposition Intervention, is coded 1 if there is an ongoing P5 military presence supporting opponents of the current government in a given country-month. Pro-State Intervention is coded 1 in 974 of 31,175 observations, while Pro-Opposition Intervention is coded 1 in 695 of 31,175 observations.

We also include a measure of alliance commitments between the state in question and the P5. This variable, which is coded 1 if the state in question has a defensive pact with any P5 member in the current year, is used as a second measure to capture the military closeness of a given state to any P5 member. We focus on defensive alliances because these represent the highest level of military commitment, suggesting that the state is important to the P5 state. The advantage of this variable is that while a military intervention may be better at capturing the immediate links between the state and a P5 member, there may be no need for military intervention in a given month. Alliance commitments, which are more long-term, should pick up on the underlying military closeness of the state with the P5 in situations where there is no active military intervention. We use the Correlates of War data on military alliances to code this variable (Gibler 2009).[18] It is coded 1 in 10,296 observations. It is lagged 1 year in the analysis.

As another measure of P5 closeness that moves beyond military relationships, we include a measure of the minimum ideal point distance from the given state to the closest P5 state. This measure is lagged 1 year. The ideal point data come from Bailey et al. (Forthcoming). Our expectation is that as this minimum distance increases, the state in

[18]We are unable to use the Alliance Treaty Obligations and Provisions (ATOP) data because it ends in 2003.

question gets farther and farther from the P5 in terms of policy similarity. This suggests that the P5 have less of a vested interest in the government of that state, and ICC involvement should be more likely, as it will not threaten strong P5 interests. We expect this variable to have the opposite effect on ICC involvement focused on the opposition: as ideal point distance to the closest P5 member increases, the P5 are more likely to have close ties with opposition groups in these dissimilar states, and will therefore have incentives to pressure the Court not to get involved in an opposition-focused examination or investigation. In the sample, the ideal point data ranges from 0 to 1.4 with a mean of .32

Control Variables

We also include several control variables to account for alternative explanations of ICC involvement. First, we include a binary variable to account for whether the state is in Africa. This variable equals 1 if the country is on the African continent, and zero otherwise. As we suggest throughout this paper, many commentators argue that the ICC has an Africa bias, as it has only initiated formal investigations in African nations. We thus expect that the ICC will become more involved in situations in Africa. Second, we include a control for whether the state in question ratified the Rome Statute. Ratifying the Rome Statute is important because it gives the ICC jurisdiction over the state in question.[19] The variable is binary; it equals 1 if the state ratified the Rome Statute and zero otherwise. Data were obtained from the ICC website.[20] We also include a measure of regime-type. This variable equals 1 if the state receives a 6 or greater on the net

[19]Ratification is not a prerequisite for ICC involvement, however, as the Security Council can refer situations in non-state parties (e.g. Sudan), and states can accept the Court's jurisdiction on a more limited basis (i.e. relating to a specific situation) without ratifying the Rome Statute.

[20]`http://www.icc-cpi.int/EN_Menus/icc/Pages/default.aspx`

polity scale and zero otherwise (Marshall and Jaggers 2010).[21] We expect the ICC to be less likely to become involved in situations in wealthier and more democratic states, as these states likely have the resources and willingness to address human rights violations domestically. Finally, we include a dummy variable to account for whether there is an ongoing civil conflicts in the state using the UCDP Armed Conflict Data (Themnér and Wallensteen 2012). We expect the ICC to be more likely to become involved if a civil war is ongoing. While the ICC is not responsible for prosecuting conflict per say, it is likely that the prevalence of conflict is correlated with war crimes. This variable is lagged one year.

Empirical Results

Onset Models

In Table 1, we present the results for the preliminary examination models. We use probit with robust standard errors to estimate this model. We first discuss the results for the onset of ICC involvement directed against governments. Perhaps most significantly, we find no statistical support for the impact of Africa on the onset of such examinations. This result is important given conventional wisdom, which suggests that the ICC and OTP are biased against African states and groups. The underlying data support this finding; the ICC has initiated 19 investigations against governments or governments and subnational actors, but only 5 involve African states. Thus, both the statistical results and basic trends in the data do not indicate that the ICC has an African bias, at least in this initial stage of ICC involvement.

We find mixed support for the legal mandate variables. As expected, we see that the government OSV variable is positive and statistically significant. In line with our

[21] The results are the same whether 6 or 7 is used as the cut-point for democracy.

argument on the ICC's mandate, this suggests that the OTP is more likely to start a preliminary examination against governments that have intentionally killed more civilians since 2002. In contrast, we fail to find support for the rule of law variable. This results is largely as expected; as discussed in the theory section above, a strong, independent judiciary may only prevent the escalation of ICC involvement to the formal investigation stage. We discuss this result in greater detail below, where tests allow us to more directly examine the effect of an independent judiciary on the specific decision to initiate a formal investigation. Thus, the results provide some support for the legal mandate argument.

We find little support for the measures that proxy the institutional constraints logic, including the P5 intervention variables, P5 alliance variable, and P5 affinity measure. The results appear to suggest that the OTP's decision to start a preliminary examination is not based on factors associated with P5 interests. Nonetheless, it is important to interpret the results with some caution for at least two reasons. First, the small number of cases (i.e. 19 preliminary examinations) makes it difficult to find statistical significance for the key variables. Second, we are unable to include any economic factors, such as trade and foreign aid due to data limitations. There is no data on economic factors that goes to 2015, the last year in our data set. We therefore cannot make any strong claims about the relationship between P5 economic interests and the probability of preliminary examinations.[22]

Finally we observe mixed results for the control variables. The civil war variable is positive and significant, suggesting that the OTP is more likely to start preliminary examinations in the context of civil wars. We also see that the democracy variable is

[22]In preliminary analyses, we find that higher levels of foreign aid are associated with a lower probability of ICC preliminary examinations. We plan to pursue this finding in greater detail in the next iteration of the paper.

positive which indicates that the OTP is more likely to initiate preliminary examinations against democratic governments compared to nondemocratic ones. The ICC ratification variable is positive as expected but it fails to reach standard levels of significance.

We also see mixed results in the model predicting opposition-focused ICC onset. While the Africa variable is positive as expected, it fails to reach standard levels of significance. The underlying data once again reinforces the statistical finding. Among the 15 cases of opposition-based preliminary examinations, only 7 of them involve groups from African states. Consistent with the results from the government model, this finding challenges the conventional wisdom that the ICC has an African bias when it comes to initiating preliminary examinations.

We see strong results for the legal mandate variables. The opposition one-sided violence variable is positive and statistically significant which suggests that the OTP is more likely to start preliminary examinations against opposition groups when they kill more civilians. We also see that the rule of law measure is negative and statistically significant. Consistent with our expectations, this indicates that the OTP is unlikely to start preliminary examinations against opposition groups when the state in question has a strong, independent legal system.

We, however, see little consistent support for the strategic variables. The P5 intervention variables, P5 affinity scores, and P5 alliance variables all fail to reach significance in this model. Consistent with the government models, this suggests that P5 interests fail to explain the OTP's decision-making in the preliminary examination stage. As suggested above, however, it is important to interpret these results with some caution given the small number of cases. Finally, we again observe mixed support for the control variables. The democracy variable is positive and significant, while the other controls fail to reach standard levels of significance.

Escalation Model

In Table 2, we present the results for the escalation models. We first discuss the findings for the government model. Overall, we find very strong and consistent results in this model. First, consistent with prevailing thought, the Africa variable is positive and significant, which suggests that the ICC is more likely to escalate its involvement against African states than governments from other states.

In addition, we see strong support for the legal mandate variables, as both the rule of law and government one-sided violence variables are statistically significant and in the expected direction. The result for the rule of law variable is important, because it suggests that complementarity is an important predictor of greater ICC involvement. As expected, the Court appears to be using the preliminary examination stage to determine if it has jurisdiction in a situation, including whether the state in question has the willingness and capability to investigate perpetrators on its own.

In contrast to the preliminary examination stage, we observe strong results for the realist variables here. The pro-government interventions variable is negative as expected, while the pro-opposition interventions measure is positive. Consistent with our argument, the P5 UNGA affinity variable is positive, and P5 alliance ties variable is negative. All four variables clearly indicate that P5 ties influence the ICC decision-making. Simply, the ICC appears to be less likely to escalate its involvement when the government in question has strong ties with P5 actors. In other words P5 interests appear to deter greater ICC involvement in situations under preliminary examination.

The control variables also produce significant results; civil war is negative and significant, while both democracy and ICC ratification are positive and significant. The result for ongoing civil war may reflect the fact that the ICC is less capable of carrying out an effective investigation in a country that has ongoing conflict. Conflict makes it difficult for investigators to safely enter the country and collect information, therefore making it

difficult for the OTP to build a strong enough case to progress to issuing indictments, holding hearings, etc.

The opposition model also produces strong findings in this stage (Table 2). As expected, the Africa variable is positive and significant, suggesting that the ICC is more likely to escalate its involvement against opposition groups who reside in Africa. While this finding is largely consistent with the African bias, it is important to interpret it in combination with the results from the onset stage, which suggest that there is not an Africa bias in the preliminary examination stage. Nonetheless, we see evidence of an Africa bias in this stage.

We also observe strong results for the legal mandate variable in the opposition model. Consistent with the onset stage, both one-sided violence and the rule of law variables are significant and in the expected direction. This provides strong evidence to suggest that the Court abides by the principle of complementarity and its mandate to prosecute the gravest offenders of human rights violations, such as civilian victimization.

We see mixed results for the realist variables here. In contrast to our expectations, the pro-opposition intervention variable is positive and significant. The surprising result for this variable requires additional research to further clarify the relationship between these types of interventions and ICC involvement against opposition groups. As expected, we see that both the pro-government interventions and the P5 alliance variables are positive and statistically significant. This suggests that P5 links once again influence the behavior of the ICC. Here, however, we see that strong ties between governments and the P5 can motivate the ICC to escalate its investigations against opposition groups.

We again find mixed support for the control variables; democracy is negative and statistically significant, while ICC ratification is positive and significant as expected. In contrast, we see no support for the civil war variable.

Post-estimation Substantive Results

The statistical results provide strong support for our legal mandate argument. We also find support for the Africa and realist variables in the escalation model. In this section, we present the post-estimation results for the statistically significant variables in the escalation equation. We report the results in Table 4. As a reminder, the response variable in this model is a six category variables that measures different levels of ICC involvement in situations. We thus use ordered probit to estimate this model. This estimator produces separate predicted probabilities for the different categories of the response variable. For the sake of parsimony, we only present the predicted probabilities for the onset of formal investigation category. This is because the predicted probabilities are largely consistent across the different levels. Further, it is likely that this represents the most significant category, as this stage is when the OTP actually moves to a formal investigation.

We first discuss the substantive results for the government model. As you can see, the predicated probability that the ICC starts a formal investigation is less than 1% outside of Africa, but this jumps to 4% when the state in question is involved in Africa. We also see strong results for the legal mandate variables. When we move the rule of law variables from low to high levels (10th to 90th percentile), we see that the predicated probability goes from 1.3% to basically zero. The Court appears to respect the complementarity principle, as it is unlikely to initiate a formal investigation when the state has a well-functioning judicial system. We see similar results for the government OSV variable. Here, the probability of ICC escalation increases from near zero to over 8% when we move from low to high levels of OSV. Thus, the OTP is far more likely to commence a formal investigation when the situation in question involves high levels of civilian victimization by the government.

The realist variables also produce substantively interesting results. The predicted probability for the pro-government intervention variable drops almost in half (9.6% to

5.5%) when there is an ongoing intervention of this type. The pro-opposition intervention variable likewise goes from 1.7% to 4.1% when there is such an intervention. Thus, it appears the intervention variables can both deter and motivate greater ICC involvement. Next, the predicted probability that the ICC investigates governments that lack P5 alliance ties is 4.2% but this decreases 2.7 percentage points to 1.5% when governments have such ties. Finally, when we move the UNGA voting measure from low to high levels (i.e. greater voting similarity), we see that the predicted probability decreases from 5.1% to 3.2%.

We next discuss the substantive results for the opposition model (Table 4). Consistent with the government model, we observe a substantively meaningful result for the Africa variable. The predicted probability is near zero for opposition groups that are outside of Africa, but it jumps to over 9% for groups that reside within Africa. This result provides strong evidence in favor of the so-called African bias.

We also see similar results for the legal mandate variables. The baseline probability that the ICC escalates its involvement against groups from low rule of law states is 2.3% but this decreases to almost zero in high rule of law states. Once again, we see strong support for the importance of the judiciary and the corresponding principle of complementarity in driving ICC behavior. In line with the legal mandate argument, the predicted probability of a formal investigation increases from 1.9% to 4.2% when we move opposition OSV from low to high levels.

The opposition model produces weaker results for the realist variables. We see two variables that proxy government links motivate greater ICC involvement against opposition groups, although the substantive impact is relatively small. The predicted probability increases from 4.4% to 4.8% when we go from no pro-government intervention to pro-government interventions. Finally, the baseline probability that the ICC escalates its involvement to a formal investigation against the opposition is 4.4 in the absence of

P5 alliance ties and this increases to 4.5% when governments share common security ties with the P5.

Conclusion

The ICC is a novel institution with the authority to investigate and prosecute individuals suspected of committing grave violations of international law. Despite a burgeoning literature on the Court, scholars have neglected to systematically investigate when the Court becomes involved in a situation. This paper attempts to fill this important gap in the literature. To that end, we put forward two theoretical arguments to explain why the Court initiates a preliminary examination in a state and whether it escalates its involvement. Specifically, we first posited that the Court acts in accordance with its mandate and thus it is more likely to become involved in states with gross violations of human rights. We second argued that the Court's behavior follows more of a realist logic, hypothesizing that the ICC is less likely to become involved or escalate its involvement when P5 interests are at stake.

A series of empirical tests provide important insights into the applicability of each of these theoretical arguments to the behavior of the Court. First, we find fairly consistent support for most of our legal framework variables, suggesting that the law and institutional incentives help to explain when the Court becomes involved in a situation. We also observe some interesting results for the independent judiciary variable. The results indicate that complementarity is most likely to matter when it comes to the decision to escalate ICC involvement. P5 interests also play an important role, particularly in the Court's decision to escalate its involvement beyond the preliminary examination stage. Close military ties with members of the P5, as well as political/policy affinity, influence the ICC's willingness to advance its involvement in a given state. Finally, we also find some important results regarding the relationship between Africa and the Court. The ICC's so-called Africa

problem is more complex than much existing commentary indicates. We find no evidence to suggest that the Court singles out Africa when it starts preliminary examinations. However, consistent with some critics, we find that the Court has clearly chosen to focus on situations in Africa when it comes to formal investigations, warrants, and trials.

The argument advanced and the empirical results have important implications for both scholars and researchers interested in the ICC and human rights more generally. We find support for both our legal mandate and institutional constraints arguments, suggesting that the Court's decision-making is complex. Scholars debate whether international bodies are really independent or whether they simply reflect the interests of powerful states. Our analysis of the ICC, one of the most independent international institutions, suggests that even this organization cannot fully divorce itself from the influence of powerful states. In its quest for institutional legitimacy, the ICC must serve the dual goals of fulfilling its mandate and remaining cognizant of powerful states' interests. Finally, we address the so-called Africa bias in the Court and find mixed support for such claims. Our findings suggest that the critics may overstate this problem to some extent, but that some bias does exist.